IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.M.JOSEPH

FRIDAY, THE 14TH DECEMBER 2007 / 23RD AGRAHAYANA 1929

OP.No. 12417 of 2003(C)

---

PETITIONER:

---

OVERSEAS TRADES AND SERVICES,
OVAL HOUSE, M.G.ROAD, COCHIN-15, REPRESENTED BY
ITS MANAGING PARTNER BABU C.GEORGE.

BY ADV. SRI.N.SUKUMARAN
SRI.S.SHYAM
SRI.N.K.KARNIS
SRI.LATHEESH SEBASTIAN

RESPONDENTS:

---

1. ASSISTANT COLLECTOR OF CUSTOMS (DBK),
CUSTOMS HOUSE, COCHIN-9.

2. COLLECTOR OF CUSTOMS (APPEALS),
CUSTOM HOUSE, COCHIN-9.

3. UNION OF INDIA, REPRESENTED BY ITS
SECRETARY TO THE MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE) SANSAD MARG,
NEW DELHI-1

BY ADV. SRI.P.PARAMESWARAN NAIR, ASST.SOLICITOR GENERAL.

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 14/12/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON C.M.P. NOS.21217 OF 2003 IN O.P. NO. 12417 OF 2003.

DISMISSED.

14.12.2007. SD/- K.M. JOSEPH, JUDGE.

APPENDIX

PETITIONER'S EXTS:

EXT. P1 : TRUE COPY OF THE LETTER ISSUED BY THE 1ST RESPONDENT TO THE PETITIONER DATED 29.3.1988 BEARING NO.D.L.NO.6/88 DBK.

EXT. P2 : TRUE COPY OF THE JUDGMENT IN O.P. 4772/1988 OF THE HON'BLE HIGH COURT OF KERALA DATED 24.6.1992.

EXT. P3 : TRUE COPY OF THE APPEAL MEMORANDUM SUBMITTED BY THE PETITIONER AGAINST EXT.P1 BEFORE THE 2ND RESPONDENT DATED 2.7.1992.

EXT. P4 : TRUE COPY OF THE ORDER OF THE 2ND RESPONDENT DATED 22.7.1992 BEARING ORDER IN APPEAL 152/92.

EXT. P5 : TRUE COPY OF THE REVISION PETITION SUBMITTED BY THE PETITIONER BEFORE THE 3RD RESPONDENT AGAINST EXT.P4, DATED 26.8.1992.

EXT. P6 : TRUE COPY OF THE ORDER OF THE 3RD RESPONDENT DATED 11.3.2003 BEARING ORDER-IN-APPEAL NO.C27/DBK/11/92 CHN (152/92) DATED 22.7.1992.

**K.M.JOSEPH, J.**

- - - - - - - - - - - - - - - - - - - - - - - - -

O.P. No.12417 of 2003

- - - - - - - - - - - - - - - - - - - - - - - - -

Dated this the 14th day of December, 2007

**JUDGMENT**

Petitioner calls in question Exts. P1, P4 and P6. Petitioner carried out export of certain goods on 12.7.1984. He was given duty drawback in respect of import duty paid on 20.9.1984. On 29.3.1988, that is more than three years from the date on which he was paid the duty drawback, petitioner was served with Ext.P1 calling upon him to pay a sum of Rs.50,533.90. This was on the basis that petitioner was paid the said amount erroneously as duty drawback on the basis of the application of wrong rate. Petitioner filed a writ petition, which was disposed of by Ext.P2 judgment relegating the petitioner to the pursuit of the alternate remedy. Petitioner preferred Ext.P3 appeal. Appeal came to be rejected by Ext.P4. Petitioner thereupon filed Ext.P5 revision. It is the said revision, which has been rejected by Ext.P6.

2. Learned counsel for the petitioner has raised two contentions. In the first place, he would contend that before issuing Ext.P1 petitioner has not been issued with any notice. He would further contend that the claim for return of the duty drawback erroneously paid to the

petitioner would amount to refund of the amount and it is barred by limitation.

3. I may take up the second contention first. Learned counsel for the petitioner expatiates and submits that Section 28 of the Customs Act deals with the period of limitation. The relevant portion of Section is extracted hereunder.

> "**28. Notice for payment of duties, interest, etc**.-
> (1) When any duty has not been levied or has been short-levied or erroneously refunded, or when any interest payable has not been paid, part paid or erroneously refunded, the property officer may, -
>
> (a) in the case of any import made by any individual for his personal use by by Government or by any educational, research or charitable institution or hospital, within one year;
>
> (b) in any other case, within six months,
>
> from the relevant date, serve notice on the person chargeable with the duty or interest which has not been levied or charged or which has been so short-levied or part paid or to whom the refund has erroneously been made, requiring him to show cause whey he should not pay the amount specified in the notice:"

He would contend that it is clear the period of limitation is six months as far

as the case of the petitioner is concerned, as it relates to the amount paid erroneously as duty drawback, which amounts to refund. He then drew my attention to Section 75 of the Customs Act and then took me through the Customs and Central Excise Drawback Rules, 1979, therein he referred to Rule 14. Rule 14 provides for repayment of erroneous or excess payment of drawback. It reads as follows:

> **"14. Repayment of erroneous or excess payment of drawback.-**
> Where an amount of drawback has been paid erroneously or the amount so paid is in excess of what the claimant is entitled, the claimant shall, on demand by an officer of customs repay the amount so paid erroneously or in excess, as the case may be, and where the claimant fails to repay the amount, it shall be recovered in the manner laid down in sub-section (1) of section 142 of the Customs Act, 1962 (52 of 1962)."

He would then submit that even if it is assumed for a moment that Section 28 does not apply, it is not open to an authority to seek recovery of an amount beyond the period of limitation under the general Law of Limitation. According to him, recovery is being made beyond three years from the date of refund. Therefore, in so far as the period of limitation for a

suit is three years, the demand is beyond the time prescribed under the general Law of Limitation.

4. In order to appreciate the contention raised by the petitioner in regard to the period of limitation, it is necessary to note Rule 16 of the Drawback Rules, 1995, which is extracted in Ext.P6. It reads as follows:

> "Where an amount of drawback and interest, if any, has been paid erroneously or the amount so paid is in excess of what the claimant is entitled to, the claimant shall, on demand by a proper officer of Customs, repay the amount so paid erroneously or in excess, as the case may be, and where the claimant fails to repay the amount it shall be recovered in the manner laid down in sub section (1) of Section 142 of the Customs Act, '62."

Payment of drawback is covered by Section 75 of the Act. It falls under Chapter X dealing with drawback allowable in various situations. It starts with Section 74 and ends with Section 76. Section 75 deals with drawback on imported materials used in the manufacture of goods which are exported. Therefore, the provision of law, which is squarely applicable to the case of the petitioner is Section 75. It is in pursuance of the power given under Section 75 the Duty Drawback Rules have been framed by the Government and it is under the said rules provision is made for recovering duty

drawback paid erroneously. Section 28, in my view, provides for a period of limitation in respect of duty which has not been levied or short levied or has been erroneously refunded. It also refers to interest payable, which is not paid or part paid or erroneously refunded. There is no case for the petitioner that the amount in question would qualify as duty, which has not been paid. Nor is it a case of short levy. What counsel for the petitioner would submit is that this shall be a case where, if at all, duty has been erroneously refunded. In other words, his contention appears to be that when duty drawback is paid, it amounts to refund of duty within the meaning of Section 28. In order to appreciate the question as to whether there is any substance in the contention of the petitioner, it is necessary that reference is made also to Sections 26 and 27 of the Customs Act. So far as they are relevant, they are extracted hereunder:

> **"26. Refund of export duty in certain cases.-** Where on the exportation of any goods any duty has been paid, such duty shall be refunded to the person by whom or on whose behalf it was paid, if-
>
> (a) the goods are returned to such person otherwise than by way of re-sale.
>
> (b) the goods are re-imported within one year from the date of exportation; and

(c) an application for refund of such duty is made before the expiry of six months from the date on which the proper officer makes an order for the clearance of the goods.

**27. Claim for refund of duty.-** (1) Any person claiming refund of any duty-

(i) paid by him in pursuance of an order of assessment; or

(ii) borne by him,

may make an application for refund of such duty and interest, if any, paid on such duty to the Assistant Commissioner of Customs or Deputy Commissioner of Customs-

(a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, before the expiry of one year;

(b) in any other case, before the expiry of six months,

from the date of payment of duty and interest, if any, paid on such duty in such form and manner as may be specified in the regulations made in this behalf and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 28C) as the applicant may furnish to establish that the amount of duty and interest, if any, paid on such duty in relation to which such refund is claimed was collected from, or paid by, him and the

> incidence of such duty and interest, in any, paid on such duty had not been passed on by him to any other person:"

Learned counsel for the petitioner fairly submits that the case of the petitioner does not fall under Section 26. It also does not fall under Section 27. If it is true that the case of the petitioner does not come within the four walls of Sections 26 and 27, I fail to understand how the petitioner can call upon me to equate duty drawback to refund of duty. The concept of refund of duty is to be understood with reference to the specific provisions, which specifically contemplate refund of duty. If drawback were to be encompassed within Section 28, nothing prevented the legislature from incorporating drawback erroneously paid also within Section 28 expressly. While it is true as the learned counsel for the petitioner contends that the rule making authority cannot except upon the rule perishing, make a rule in the teeth of the parent act, I would think that this case does not call for principle of ultra vires as the rule is not ultra vires Section 28. The authorities are right in finding that Section 28 of the Act does not apply to the facts situation arising in this case. Duty draw back is a concept which is to be understood with reference to the provisions contained in Chapter X, and it is specifically dealt with thereunder and in the Rules made under the

parent legislation. Therefore, I am of the view that the argument of the petitioner that draw back is refund within the meaning of Section 28 is only to be repelled and I do so.

5. Then learned counsel for the petitioner would contend that even if the period of limitation prescribed under Section 28 does not apply, the respondents are not free from the trammels of the Indian Limitation Act and what is sought to be recovered being the sum of money due from the petitioner, the period of limitation at any rate is three years from the date on which the amount is paid to the petitioner. Admittedly the amount has been paid more than three years from the date on which Ext.P1 is issued. Therefore, it is contended that law of limitation strikes at the effort contained in Ext.P1 to recover the duty draw back paid to the petitioner. I am afraid that there is no merit in the said contention either. It is true that the amount is sought to be recovered beyond three years from the date of payment. But at the same time I find that the article applicable to the case on hand is 112 of the Indian Limitation Act. Indian Limitation Act has granted an exception in respect of suits by Government, namely, an enlarged period of limitation of thirty years. Therefore, the period of limitation, if at all applicable, in respect of the claim made is thirty years.

The claim is well within the period of thirty years.

6. What further remains is the contention of the petitioner that the petitioner has not been served with any notice. I may have been inclined to see some merit in this contention but for two facts. The petitioner preferred an appeal as Ext.P3. I perused the appeal and I found that there is no plea at all taken that the petitioner was not issued with any notice or that the petitioner has put to any prejudice in the absence of notice before Ext.P1 is issued. The only point taken was the plea of limitation. No doubt, in Ext.P5 revision there is reference to the ground that there is no notice served on the petitioner. But I find in the order that there is no reference made to it. Apparently, the petitioner has not pressed this as a ground and what was really in issue was the plea of limitation, which I have found has been correctly dealt with by the authorities. I do not see any merit in this contention. In such circumstances, the Original Petition fails and it is dismissed.

(K.M. JOSEPH, JUDGE)

sb

**K.M. JOSEPH, J.**

---

O.P. No.12417 OF 2003.

---

**JUDGMENT**

14.12.2007.